IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 30, 2008

STATE OF TENNESSEE v. RICHARD LEVRON CAMPBELL, ALIAS

Appeal from the Criminal Court for Knox County
No. 74726 Ray L. Jenkins, Judge

No. E2007-01239-CCA-R3-CD - Filed May 20, 2009

The Defendant-Appellant, Richard Levron Campbell (hereinafter "Campbell"), appeals the length of the sentence imposed by the Criminal Court of Knox County. Campbell entered a guilty plea to second degree murder and was sentenced, as a Range I, violent offender, to a twenty-three year period of confinement to be served at 100% in the Department of Correction. At the same time, Campbell also pleaded guilty to the Class A and B misdemeanors of simple assault and resisting arrest for which he received sentences of eleven months and twenty-nine days, and six months, respectively. The misdemeanor sentences were to be served concurrently with the second degree murder sentence. On appeal, Campbell contends that the trial court erred in its rulings regarding the enhancement and mitigating factors and improperly imposed a sentence near the top of the range for second degree murder. Specifically, Campbell argues that the trial court erred by (1) enhancing his sentence based on his convictions for assault, resisting arrest, and his criminal behavior of underage drinking and drug use, (2) enhancing his sentence based on "exceptional cruelty during the commission of the offense," and (3) failing to mitigate his sentence based on his mental problems, his lack of prior convictions, his remorse for the crime, and the unusual circumstances surrounding the crime. Upon review, we affirm the trial court's judgment as modified.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed as Modified

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Bruce E. Poston, Knoxville, Tennessee, for the defendant-appellant, Richard Levron Campbell, Alias.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip Morton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

Guilty Plea Hearing. At the guilty plea hearing, the State outlined the facts underlying Campbell's conviction:

> Your Honor, if called to trial on this matter, the proof would establish that on March [13], 2002, officers were called to an apartment in Townview Towers here in the city of Knoxville, Knox County.
>
> When they arrived, they found a black female identified as Indie Page. She was – had been partially submerged in a bathtub. She was found by her boyfriend about one o'clock in the morning. The water was still running in the bathtub. She did not have any vital signs when she was checked by the paramedics at the apartment.
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> It was reported by her boyfriend who found her in that condition when he came home. That someone other than him had been responsible for her condition.
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> An autopsy revealed that she had been strangled and/or smothered, and the evidence suggested within that apartment.
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> This defendant was detained approximately two weeks later as he attempted to board a bus at the Greyhound Bus Station.
>
> He was interviewed by Detective Greg Knight with the Knoxville Police Department. During his interviews with Detective Knight, he acknowledged having a confrontation with Ms. Page in that apartment. His statement to Detective Knight was that the victim tried to rob him, demanded money and pulled a knife on him. In response to that, he grabbed her around the neck and choked her until she passed out on the floor, and that he thereafter took her to the bathroom in an attempt to revive her by splashing water on her face or somehow trying to revive her by using water.
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> The further proof would show all this – let me add one other thing. The autopsy confirmed that cause of death as being strangulation and/or smothering, consistent with the statement that Mr. Campbell gave to Detective Knight.
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> All these things took place here in Knox County.

Sentencing Hearing. On May 8, 2007, at Campbell's sentencing hearing, the State informed the trial court, "Your Honor, we're proceeding to sentence under the sentencing act prior to 2005, since this act – this event occurred, I think, in 2002. I think that either way you proceed we get, hopefully, the same result. I make my comments under the prior sentencing act." The State asserted that two enhancement factors existed to which significant weight could be given. First, the State claimed that enhancement factor (1) applied, namely that "[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." T.C.A. § 40-35-114(1) (Supp. 2001). The State argued that the two misdemeanor offenses, resisting arrest and simple assault of a police officer, that were a part of

Campbell's guilty plea agreement, could be used to enhance his sentence. In addition, the State argued that "as reflected in the presentence report, [Campbell] admits when he's not been in jail to criminal behavior of consuming alcohol on an underage basis on a daily basis, and also possession and use of marijuana and possession of cocaine on many occasions."

The State also asserted that enhancement factor (5) applied, namely that "[t]he defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense." Id. § 40-35-114(5) (Supp. 2001). The State explained its reasoning for the application of enhancement factor (5):

> [T]he stipulated facts were that this defendant got into an argument. He violently choked the victim until she died in one portion of this apartment. And thereafter drug [sic] her body into the bathroom, filled it partially with water and placed as much of her body as he could inside that bathtub half full of water.

The State also argued that enhancement factors (10), "[t]he defendant had no hesitation about committing a crime when the risk to human life was high," and (16), "[t]he crime was committed under circumstances under which the potential for bodily injury to a victim was great," applied. Id. § 40-35-114(10), (16) (Supp. 2001). The State ultimately recommended the maximum sentence in the range:

> In summary, Judge, we ask for a 25 year [sic] sentence on the Class A felony. I think our agreement calls for the misdemeanors to be concurrent. Under the old law the Court would start at 20 [years] and evaluate enhancement factors and mitigating factors. And we suggest that by starting at 20 [years] and applying enhancing factors, there are no mitigating factors, . . . the State feels it appropriate that the Court should impose a 25 year [sic] sentence. Even if you don't start at the mid point [of the range] under the new act, which we're not proceeding under because he's not chosen to do that, we think the enhancing factors are sufficient to [enhance Campbell's sentence to twenty five years], and that's what we ask for.

The State added that it believed Campbell was dangerous to law enforcement and to society in general:

> I think we placed in the record . . . the fact that this defendant has been behaving in a difficult fashion, . . . he refuses – has refused to cooperate with the jail authorities in coming to this hearing, we suggest that reflects further on his potential dangerousness to certain law enforcement and others if and when he's released.

Defense counsel responded that Campbell's uncooperativeness stemmed from his mental issues:

> DEFENSE COUNSEL: [W]e heard different things, but in talking to the people in the jail now, Mr. Campbell wasn't acting out in terms of refusing to come to court, he was having a repeat of what we've had over the last few

years. He's mentally challenged, your Honor. We have that in our record.

CAMPBELL: I'm mentally disturbed.

DEFENSE COUNSEL: Shhh. Shhh. And he is mentally disturbed. And he has been out at the penal farm in the medical – not in the 6C, which is for danger, but for treatment of his own – for his own care. So I want to make clear that we're dealing with someone that has issues. And in our record, your Honor, he has been sent to Middle Tennessee twice, and their findings, while didn't support insanity, they did find that he is retarded. And we point out in the presentence report he's been on SSI for mental disability all of his life. He has no criminal history. None.

CAMPBELL: – measure for things –

DEFENSE COUNSEL: He – and I apologize, your Honor.

CAMPBELL: – measure –

DEFENSE COUNSEL: He is just slow. He is very, very slow. He has no criminal history, your Honor. The facts that General Morton say[s] are true in terms of strangulation. He's a very strong man that doesn't understand his own strength.

Defense counsel argued against the enhancement factors suggested by the State and argued for several mitigating factors:

> He's been in jail a long time. We've had him treated twice. The findings are the same. His SSI shows his disability. And we suggest that mitigation factors regarding that, that he didn't fully have the capacity to appreciate what he was doing. And the key to that is what General Morton told you about the bathtub, your Honor, because the officer testified, and it's in the facts, that Mr. Campbell was trying to wake the victim up. That's why he took her to the bathtub to splash water on her. And I think the Court needs to look at that in terms of his intent.
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> Yes, we did plead to second degree, but the facts were that this man thought he had done something wrong and then was trying to wake up this poor girl. That shows that mental – that mentally challenged mind, your Honor.

He has no criminal record at all up until this. He's a homeless mentally challenged person that stands before you, and I hope [he] will go to the very special needs when he goes for his incarceration.

We don't believe that the enhancement factors apply because when you look at the case law exceptional cruelty is more for the torture, the beatings, the other things that go along with more than what is necessary to commit the alleged crime. And, of course, the danger and the two things the State proposes are part and parcel of second degree murder. . . . [The same thing applies for enhancement factor (10),] no hesitation about committing a crime when the risk to human life is high. Well, we're here on a second degree murder, so that can't apply and neither can the other one. And that's just clear case law.

We think that no enhancement factors apply in this case, which is very unusual. He has no criminal history. And while he's certainly not in any condition today [to testify regarding his remorse], through no fault of his, and not because he's trying to act out, but because of his mental ability, and they're treating him right now. If you look at the presentence report, he flat out says over and over, and he's told me this, and he says to the probation officer how sorry he is, he wishes he could change places.

I don't think I've had a client that's been more remorseful. And I'm just sorry that his mental condition doesn't allow him to say today what he said to the probation officer and what he's said to me repeatedly. And he told you he wishes he could trade places. He has remorse, no record, and is [mentally] challenged. And the facts of this case show that he was even trying to wake up the victim.

Your Honor, we think that this is the first time I can stand before you and honestly say I believe there's no enhancement factors, only mitigation factors, and the appropriate sentence is 15 years. It's a long time and very hopefully they can help him. He's obviously over his substance abuse problems, but give him a trade. He does like to work. And hopefully they will keep him segregated so he doesn't become prey when he goes through the prison. Thank you, your Honor.

After hearing arguments from the State and defense counsel, the trial court made the following ruling:

This is sentencing, the . . . conviction of second degree murder of the defendant Richard Levron Campbell in cause 78426. . . . [T]he plea was . . . to second degree murder. The range of punishment for that offense is not less than 15 years nor more than 25. Sentencing is controlled by TCA 40-35-210. The Court has determined the class and range of punishment. . . . There was no evidence at the sentencing hearing, or statements of the parties.

> The presentence report with principles of sentencing and arguments as to sentencing alternatives, there being no applicable sentencing alternatives. The Court is required to consider sentencing considerations contained in 40-35-103, that sentences involving confinement should be based on the following considerations. That is confinement is necessary to avoid depreciating the seriousness of the offense. And the offense is not probatable.
>
> The principles of the sentencing and arguments – well – the nature and characteristics of the criminal conduct involve and the evidence and information of the parties on the mitigating and enhancement factors contained in 40-35-114, in the Court's opinion there are no mitigating circumstances contained in 40-35-113. The State insists upon applications of certain elements of enhancement. The defendant has been convicted of assaulting a police officer, that would be considered another, and resisting arrest, and criminal behaviors of almost daily violations of average consumption of alcohol, et cetera.
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> . . . The Court finds these enhancement factors, with regard to exceptional cruelty during the commission of the offense, the Court finds that enhancement factor.

The trial court noted that the sentencing statute required him to hear any statement from the defendant. Defense counsel responded that Campbell would rely on his statement of remorse in the presentence report. Finally, amid frequent interruptions by Campbell, the Court ruled, "In cause 74726 on your plea of guilty, the Court finds you guilty of the offense contained in this indictment, second degree murder, and fixes your punishment at 23 years." The trial court imposed a sentence of eleven months and twenty-nine days for the simple assault charge and imposed a sentence of six months for the resisting arrest charge, to be served concurrently with the twenty-three year sentence.

Sentencing Factors. Campbell contends that the trial court erred in its application of the enhancement and mitigating factors and improperly sentenced him near the top of the range for the second degree murder conviction. In response, the State argues that: (1) Campbell's prior convictions alone are sufficient to enhance his sentence from twenty years to twenty-three years; (2) Campbell cannot prove that, had he proceeded to trial, a reasonable jury would not have found the two enhancement factors applied by the trial court; (3) Campbell's daily use of alcohol, as stated in the presentence report, is a sufficient ground for enhancement; (4) Campbell used "exceptional cruelty" in choosing to strangle the victim during the commission of this homicide; (5) Campbell failed to establish plain error regarding his sentence; and (6) Campbell failed to prove that the trial court committed reversible error regarding the mitigating factors because he declined to present any proof regarding his mental disability, the unusual circumstances of the crime, his remorse, or his lack of criminal history.

On appeal, we must review issues regarding the length and manner of service of a sentence de novo with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d) (1997). Nevertheless, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the

sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The defendant, not the State, has the burden of showing the impropriety of the sentence. Sentencing Comm'n Comments, T.C.A. § 40-35-401(d) (1997). This means that if the trial court followed the statutory sentencing procedure, made adequate findings of fact that are supported by the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, this court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In this case, our review will be de novo without a presumption of correctness because the trial court failed to affirmatively show in the record its consideration of the sentencing principles.

> A trial court, when sentencing a defendant, must consider the following:
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> (1) The evidence, if any, received at the trial and the sentencing hearing;
> (2) The presentence report;
> (3) The principles of sentencing and arguments as to sentencing alternatives;
> (4) The nature and characteristics of the criminal conduct involved;
> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
> (6) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40-35-210(b) (Supp. 2001); State v. Williams, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

Campbell claims for the first time on appeal that his sentence is excessive under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). On June 24, 2004, the United States Supreme Court held in Blakely that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Id. at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). However, on April 15, 2005, the Tennessee Supreme Court held that the Tennessee Criminal Sentencing Reform Act of 1989 did not violate a defendant's Sixth Amendment right to a jury trial. See State v. Gomez, 163 S.W.3d 632, 654-62 (Tenn. 2005) ("Gomez I"), vacated and remanded, Gomez v. Tennessee, 549 U.S. 1190, 127 S. Ct. 1209 (Feb. 20, 2007). On June 7, 2005, the Tennessee legislature passed a new sentencing law eradicating presumptive sentences and establishing advisory sentencing guidelines. A year and a half later, on January 22, 2007, the United States Supreme Court held that California's sentencing laws, which were very similar to Tennessee's pre-2005 sentencing act, violated the Sixth Amendment right to a jury trial, based on Blakely. See Cunningham v. California, 549 U.S. 270, 293, 127 S. Ct. 856, 871 (2007). On October 9, 2007, in light of Blakely and Cunningham, the Tennessee Supreme Court held that a defendant's Sixth Amendment right to a jury trial is not satisfied when a trial court enhances a defendant's sentence using factors that were not found by a jury. State v. Gomez, 239 S.W.3d 733, 741 (Tenn. 2007) ("Gomez II") (citing Cunningham, 549 U.S. at 274, 127 S. Ct. at 860). Recently, this court concluded that "[t]he presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant."

State v. Phillip Blackburn, No. W2007-00061-CCA-R3-CD, 2008 WL 2368909, at *14 (Tenn. Crim. App., at Jackson, June 10, 2008), no cert. filed.

Although the date of the second degree murder offense was March 13, 2002, Campbell was not sentenced until May 8, 2007. The transcript from the sentencing hearing shows that Campbell was sentenced under the pre-2005 sentencing act. As such, we note that Campbell could have elected to be sentenced under the June 7, 2005, amendments to the sentencing act, which complied with Blakely v. Washington, so long as he executed a waiver of his ex post facto protections. See 2005 Tenn. Pub. Acts ch. 353, § 18. Because the record indicates that Campbell did not execute an ex post facto waiver, his sentence is governed by the pre-2005 sentencing act.

The pre-2005 sentencing act required the trial court to begin its determination of the appropriate sentence with a "presumptive sentence." T.C.A. § 40-35-210(c) (Supp. 2001). For Class A felonies, the presumptive sentence was the midpoint of the appropriate range for the offense. Id. When there were enhancement factors but no mitigating factors for a Class A felony, the trial court was required to set the defendant's sentence at the midpoint of the range or above the midpoint of the range. Id. § 40-35-210(d) (Supp. 2001). When there were mitigating factors but no enhancement factors for a Class A felony, the trial court was required to set the defendant's sentence at the midpoint of the range or below the midpoint of the range. Id. Finally, when there were enhancement factors and mitigating factors for a Class A felony, the trial court was required to "start at the midpoint of the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors." Id. § 40-35-210(e) (Supp. 2001).

For the purposes of appellate review, our supreme court requires the following of the trial court:

> [T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence.

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

In this case, Campbell was sentenced as Range I, violent offender. See T.C.A. § 40-35-105 (a), (b), -501(i) (1997). Second degree murder, a Class A felony, has a sentence range of fifteen to twenty-five years. Id. § 40-35-112(1) (1997). The presumptive sentence or the midpoint in the range for second degree murder is twenty years. Id. § 40-35-210(c) (Supp. 2001).

The trial court then applied the following two enhancement factors to Campbell:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
> . . . .

(5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense[.]

Id. § 40-35-114(1), (5) (Supp. 2001).

The court did not apply any mitigating factors to Campbell's sentence.

I. Prior Convictions and Prior Criminal Behavior. Campbell contends that the trial court erred in applying enhancement factor (1), "[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range," because of his simple assault and resisting arrest offenses and his criminal behavior of drinking and drug use. Id. § 40-35-114(1) (Supp. 2001). First, he argues that the date of the offense rather than the date of conviction determines whether the conviction can be used to enhance a defendant's sentence. See State v. McKnight, 900 S.W.2d 36, 54 (Tenn. Crim. App. 1994), abrogated on other grounds by State v. Williams, 977 S.W.2d 101 (Tenn. 1998)). Campbell notes that he pleaded guilty to second degree murder based on his illegal conduct on March 13, 2002. While he acknowledges that his January 26, 2002 resisting arrest offense can be used to enhance his sentence, he contends that his May 15, 2002 simple assault offense cannot be used to enhance his sentence because it occurred after he committed the second degree murder offense.

We disagree. This court has stated that a trial court can consider criminal behavior or convictions occurring prior to the sentencing hearing as "a previous history of criminal convictions or criminal behavior" under section 40-35-114(1), "'regardless of whether the convictions or behavior occurred before or after the criminal conduct under consideration.'" State v. Jordan, 116 S.W.3d 8, 24 (Tenn. Crim. App. 2003) (quoting State v. Ed Waters, No. 01-C-019106-CR-00158, 1992 WL 28457, at *3 (Tenn. Crim. App., at Nashville, Feb. 20, 1992)). Therefore, we conclude that it is proper for the resisting arrest and the simple assault offenses to be considered for the purpose of enhancement under section 40-35-114(1) (Supp. 2001). However, we note that the rule in Jordan should not be used when determining a defendant's sentencing range. Regarding sentencing range, "[t]he prior felony convictions used to trigger the multiple offender status must have occurred prior to the commission of the offense for which the defendant is being sentenced." Sentencing Comm'n Comments, T.C.A. § 40-35-106 (1997); see also State v. Wilburt Vantressee Gooch, No. 01C01-9304-CR-00139, 1994 WL 194263, at *2 (Tenn. Crim. App., at Nashville, May 19, 1994).

Campbell also argues that even if the resisting arrest offense is used to enhance his sentence, it should only be given slight weight. See State v. Marlon Avery Bussell, No. E2004-01239-CCA-R3-CD, 2005 WL 2043843 at *5 (Tenn. Crim. App., at Knoxville, Aug. 23, 2005). He adds that he had no prior convictions other than the two misdemeanor offenses previously mentioned. We acknowledge that Campbell had no other prior convictions at the time that he pleaded guilty to second degree murder, resisting arrest, and simple assault. Although we have determined that the simple assault and resisting arrest offenses can be used to increase his sentence under enhancement factor (1), we agree that these two misdemeanors should only be given slight weight.

Campbell further contends that the trial court improperly relied on his statements in the presentence report, admitted without objection, regarding underage drinking and drug use to enhance his sentence and that "such a 'bare bones statement'" is insufficient to enhance a sentence. See State v. Clifford Atkins, No. 03C01-9302-CR-00058, 1994 WL 81524, at *13 (Tenn. Crim. App., at Knoxville, Mar. 3, 1994) (concluding that the defendant's "bare bones" admission of a drug and alcohol problem in the presentence report was not enough to enhance his sentence based on prior criminal activity, given that there was no proof at the sentencing hearing of any criminal conduct or the use of illegal drugs); see also State v. James E. Brice, No. 03C01-9605-CC-00189, 1996 WL 689923, at *3 (Tenn. Crim. App., at Knoxville, Dec. 3, 1996) (stating that "defendant's admitted underage drinking in this case is entitled to little or no weight as an enhancing factor because it occurred approximately ten years before this offense and did not result in any arrests or convictions"), abrogated on other grounds by State v. Winfield, 23 S.W.3d 279, 283 (Tenn. 2000). Further, he reasons that statements regarding underage drinking should not be used against him because this information is requested "for treatment purposes to help change a person's direction" and because "use of this information to further punish an individual would, necessarily, stifle the providing of same." Although Campbell does not directly raise this issue, we acknowledge that panels of this Court have disagreed upon whether such an admission complies with Blakely. Compare State v. Charles Vantilburg, No. W2006-02475-CCA-R3-CD, 2008 WL 382765 * 9 (Tenn. Crim. App., at Jackson, Feb. 12, 2008) (holding that statements "made outside the confines of any judicial proceeding . . . do not qualify as admissions for purposes of the Sixth Amendment) perm. to appeal denied (Tenn. Aug. 25, 2008) with State v. Anthony Riggs, No. M2007-02322-CCA-RM-CD, 2008 WL 1968826, at *5 (Tenn. Crim. App., at Nashville, Dec. 15, 2008) (holding that an unequivocal admission made at trial or during the sentencing process, or a factual acknowledgment in the presentence report introduced without objection at sentencing complies with Blakely) no perm. to appeal filed. However, because we have concluded that the simple assault and resisting arrest offenses could be used to enhance Campbell's sentence, it is unnecessary to reach this issue. We conclude that the prior convictions sufficiently justify an increase in Campbell's sentence without considering his statement regarding other criminal behavior provided in the pre-sentence report.

II. Exceptional Cruelty During Commission of the Offense. Campbell next contends that the trial court improperly applied enhancement factor (5), "[t]he defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense," because this factor requires "a finding of cruelty over and above" what is required to sustain a conviction for an offense. T.C.A. § 40-35-114(5) (Supp. 2001). This factor was neither admitted by Campbell nor reflected in the jury's verdict; therefore, Blakely and it's progeny preclude the use of this enhancement factor when applying the pre-2005 Tennessee Sentencing Act. Because Campbell failed to raise a Sixth Amendment objection during his sentencing hearing, he is not entitled to plenary review. Instead, we can only review this issue for plain error. See Tenn. R. Crim. P. 52(b) ("When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal."). "It is the accused's burden to persuade an appellate court that the trial court committed plain error." State v. Bledsoe, 226 S.W.3d 349, 355 (Tenn. 2007) (citing United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778 (1993)). In Adkisson, our court stated that in order for an error to be considered plain:

(a) the record must clearly establish what occurred in the trial court;
(b) a clear and unequivocal rule of law must have been breached;
(c) a substantial right of the accused must have been adversely affected;
(d) the accused did not waive the issue for tactical reasons; and
(e) consideration of the error is "necessary to do substantial justice."

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994).

As to factor (a), we conclude that the record includes the presentence report, technical record, and transcript from the sentencing hearing, which make it clear that the trial court enhanced Campbell's sentence from the presumptive sentence of twenty years to twenty-three years for the second degree murder conviction. We conclude that the record is sufficiently clear for our review. As to factor (b), a clear and unequivocal rule of law was breached because the trial court applied an enhancement factor in contravention of Blakely. As to factor (c), because the trial court applied an enhancement factor that was not found by a jury beyond reasonable doubt, Campbell's substantial Sixth Amendment right to a trial by jury was adversely affected. As to factor (d), the record does not indicate that Campbell waived the Blakely issue for tactical reasons. As to factor (e), we conclude that consideration of this issue is necessary to do substantial justice in Campbell's case. Accordingly, we conclude that it was plain error for the trial court to enhance Campbell's sentence based on enhancement factor (5). T.C.A. § 40-35-114(5) (Supp. 2001). Following consideration of the other sentencing issues, we conclude that modification of Campbell's sentence is necessary.

III. Failure to Apply Mitigating Factors. Campbell argues that the trial court should have applied the following mitigating factors in his case:

> (8) The defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense;
> . . . .
>
> (11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct;
> . . . .
>
> (13) Any other factor consistent with the purposes of this chapter.

Id. § 40-35-113 (8), (11), (13) (1997). He contends that the application of these mitigating factors, even after slight weight was given to the enhancement factor regarding his criminal history, would result in a minimum sentence of fifteen years.

Initially, we note that the defendant has the burden of proving applicable mitigating factors. State v. Mark Moore, No. 03C01-9403-CR-00098, 1995 WL 548786, at *6 (Tenn. Crim. App., at Knoxville, Sept. 18, 1995) (citing T.C.A. § 40-35-401(d)). Campbell claims that mitigating factor (8), "[t]he defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense," should have been applied by the trial court. T.C.A. § 40-35-

113(8) (1997). He argues that his mental problems, while not sufficient for an insanity defense, were sufficient to diminish his culpability for the second degree murder offense. Campbell compares the facts of his case to those in State v. Blackstock, 19 S.W. 3d 200, 212-13 (Tenn. 2000) (holding that the trial court should have sentenced Blackstock as an especially mitigated offender because his mental impairment made the enhancement factor regarding the victim's vulnerability because of age or physical or mental limitations inapplicable). He also distinguishes his case from State v. Johnny Baxter, No. E2006-00669-CCA-R3-CD, 2007 WL 858776, at *7 (Tenn. Crim. App., at Knoxville, Mar. 22, 2007) (concluding that the trial court's refusal to reduce the defendant's sentence on the basis of his mental condition was proper where he "understood and accepted his role as caretaker of the victim," "could read newspapers and could read and write well enough to complete an umpire's examination," and was "classified as mildly mentally retarded"), perm. app. denied, (Tenn. Aug. 13, 2007). Here, Campbell contends that his "unusual commitment twice for mental help in Nashville, his diagnosed retardation and his very bizarre actions in court at his sentencing all show his clearly diminished capacity."

This court has stated that "while Tennessee Code Annotated section 40-35-113(8) allows a court to consider any mental condition that significantly reduced the Appellant's culpability, the Appellant must sufficiently establish not only the presence of a defect, but also a causal link between his ailment and the offense charged." State v. Robert James Yoreck, III, No. M2004-01289-CCA-R3-CD, 2003 WL 23613823, at *4 (Tenn. Crim. App., at Nashville, June 29, 2004)). Although Campbell argues in favor of this mitigation factor, he failed to offer any proof at the sentencing hearing that created a causal connection between his mental condition and the offense of second degree murder. In fact, Campbell failed to present any expert medical testimony regarding his mental condition at the sentencing hearing, choosing instead to rely on his two commitments to Nashville during his incarceration, his mental disability adjudication from Social Security, and general statements by defense counsel that he "doesn't understand his own strength." Given that Campbell presented no evidence showing how his mental condition was causally linked to the offense of second degree murder, we conclude the trial court properly determined that this mitigating factor did not apply.

Second, Campbell claims that mitigation factor (11), "[t]he defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct," should have been applied by the trial court. T.C.A. § 40-35-113(11) (1997). Again, Campbell fails to provide any evidence supporting this mitigating factor on appeal, other than to generally argue that his mental condition kept him from having the intent necessary for second degree murder. Therefore, we conclude that the trial court properly determined this mitigating factor did not apply.

Third, Campbell claims that mitigation factor (13), "[a]ny other factor consistent with the purposes of this chapter," should have been applied by the trial court. Id. § 40-35-113(13) (1997). He argues that the trial court erred in refusing to apply the "catch-all" provision of Tennessee Code Annotated section 40-35-113(13) (1997) as a mitigating factor. He notes that defense counsel emphasized his statement of remorse in the presentence report. He contends that remorse is an accepted "non-statutory mitigating factor" under the sentencing act. See State v. Leggs, 955 S.W.2d 845, 850 (Tenn. Crim. App. 1997), abrogated on other grounds by State v. Hooper, 29 S.W.3d 1

(Tenn. Sept. 21, 2000). Regarding remorse, this court has previously stated that "[a]lthough an 'expression of remorse may be a solid basis for a successful rehabilitation, there is no requirement that [remorse actually be] included among the mitigating factors set out in the catchall provision of Tenn. Code Ann. § 40-35-113(13).'" State v. Augusto Oviedo, No. W2000-01003-CCA-R3-CD, 2001 WL 846052, at *6 (Tenn. Crim. App., at Jackson, July 20, 2001) (quoting State v. Barry Waters Rogers, No. M1999-01358-CCA-R3-CD, 2000 WL 1336488, at *6 (Tenn. Crim. App., at Nashville, Sept. 15, 2000), perm. to app. dismissed, (Tenn. Jan. 12, 2001), app. denied, (Tenn. May 7, 2001)). In addition, this court has previously concluded:

> Genuine, sincere remorse is a proper mitigating factor. While remorse is a relevant concern, the mere speaking of remorseful words or a genuflection in the direction of remorse will not earn the accused a sentence reduction. The trial judge saw the defendant, listened to her testimony, and observed her demeanor and concluded that this mitigating factor did not apply.

State v. Patricia Spencer, No. W1999-00030-CCA-R3-CD, 2000 WL 279696, at *4 (Tenn. Crim. App., at Jackson, Mar. 6, 2000) (internal quotations and citations omitted). Because Campbell did not make a statement at the sentencing hearing, the trial court was unable to observe Campbell's demeanor to determine whether his remorse was genuine and sincere. The only statements the trial court was able to consider were in the presentence report, wherein Campbell stated, "I didn't mean to do what I did. I want to tell her family that I am sorry and ask them to forgive me. If I could die and bring her back I would do it." Under these circumstances, we are reluctant to conclude that the trial court erred in failing to apply this mitigation factor.

Campbell further contends that the "lack of a criminal history" can be a mitigating factor. See State v. Kelley, 34 S.W.3d 471, 483 (Tenn. Crim. App. 2000). He asserts that prior to his guilty plea, he had no prior criminal convictions. However, we previously concluded that Campbell did have a criminal history because of his simple assault and resisting arrest offenses. Accordingly, he is not entitled to relief on this issue.

CONCLUSION

After applying the single enhancement factor related to Campbell's two misdemeanor offenses, we conclude that it is appropriate to modify his sentence from twenty-three years to twenty-one years at 100%. Upon review, the judgment of the trial court is affirmed as modified.

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CAMILLE R. MCMULLEN, JUDGE